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No. 482

In the

Supreme Court of the United States

OCTOBER TERM, 1958

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

FANT MILLING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is attached as Appendix "A" to the petition and is reported at 258 F. 2d 851. The findings of fact, conclusions of law and order of the National Labor Relations Board are reported at 117 NLRB No. 168 page ..... and appear in the record heretofore filed by Petitioner. (R 117-183)[1]

[1] "R" refers to the transcript of record, "BA" to the appendix of the Board's brief in the Court of Appeals, "RA" to the appendix to Respondent's Brief in the Court of Appeals, "BB" refers to the Brief of Petitioner.

JURISDICTION

Jurisdictional requisites are stated in the petition. However, the question presented to the Court by the Petitioner is not the question determined in this case by the Board and the United States Court of Appeals for the Fifth Circuit and is not properly before the Court.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board can base an order on transactions occurring subsequent to the filing of the charge and more than six months prior to the issuance of the complaint, where such transactions are not embraced in or contemplated by the charge.

2. Whether the Regional Director for the National Labor Relations Board has authority to direct the issuance of a complaint subsequent to his refusal to do so and subsequent to appeal to General Counsel for the National Labor Relations Board while such appeal is pending before General Counsel without General Counsel having taking any action on such appeal, all contrary to the Board's published Rules and Regulations and Statement of Procedure.

STATEMENT

The salient facts germane to the questions before the Court can be stated concisely as follows:

1. Following the union being certified as the bargaining agent of respondent's employees, negotiation conferences commenced during August of the year 1953, (BA 104);

2. After several meetings, on May 20, 1954, the union filed its one and only charge against Respondent charging it with having refused to bargain on or about November 20, 1953, being a date more than six months prior to the filing of the charge, (R 19-22);

3. On July 13, 1954, the Regional Director for the Board issued its decision by which it refused to issue a complaint, (R 25-26);

4. On August 31, 1954, the union made a request for review of the Regional Director's decision and appealed such decision to General Counsel, (R 27-79);

5. On October 6, 1954, Respondent announced a wage increase retroactive to October 4, 1954, after having told the union negotiator on October 4 that such wage increase would be put into effect, (RA 3-5, 2);

6. While this matter was on appeal, before General Counsel acted thereon, and while the Office of General Counsel was vacant, the Regional Director attempted to withdraw his earlier refusal to issue a complaint, such attempt being made on January 24, 1955, (R 80-81);

7. On August 12, 1955, for the first time, General Counsel notified the parties that he had been advised that the Regional Director was withdrawing his earlier refusal to issue a complaint with respect to the charged violation of Section 8(a)1 of the Act and affirmed the Regional Director's dismissal of the charged violations of Sections 8(a)1 and 8(a)3 of the Act, (R 82-83);

8. On August 17, 1955, the Regional Director issued a complaint against Respondent, the gravamen of which was that Respondent had on or about November 21, 1953, and October 7, 1954, refused to bargain in violation of the Act, (R 84-89);

9. On November 19, 1954, more than 12 months subsequent to certification, Respondent advised the union that it no longer recognized it as the bargaining agent of its employees because it believed a majority of its employees did not desire to be represented by the union, (BA 109);

10. On April 19, 1957, the Board issued its decision in which it decided the issue of whether or not Respondent was justified in withdrawing its recognition of the union on November 19, 1954, (R 118);

11. The Board found that Respondent had during October 1954 unilaterally granted a wage increase and was thereby not justified in withdrawing its refusal to recognize the union on November 19, 1954, (R 119);

12. On August 1, 1958, the United States Court of Appeals, Fifth Circuit, properly denied enforcement of the Board's order for the reason that the order was based upon Respondent's withdrawal of union recognition more than four months after the filing of the charge and this matter had not been placed in issue by the filing of an amended charge by the union and the Board and its agencies were without power to do it for them, (Pages 30-31, Board Brief; *258 F. 2d 857-858*).

Petitioner directs most of his petition to matters anterior to the October wage increase and matters related to the

substantial evidence rule, and some of Petitioner's statements in this connection are incorrect whereby Respondent feels compelled to call the inaccurate statements, though irrelevant, to the Court's attention.

First, the statement of Petitioner to the effect that Respondent's committee was instructed by its President that the contract must not contain a no-strike clause with a monetary penalty for its breach and not provide for arbitration or for seniority being the sole governing factor in promotions or layoffs is taken from a cold record out of context and does not reveal the true facts. Respondent's President did not participate in the negotiations. He delegated this authority to other members of his organization. (RA 22) He instructed them as to his desires concerning the contract and such was the import of the testimony relied upon by Petitioner in contending that Respondent's contract negotiators did not have full bargaining authority. (RA 18) All matters properly subject to bargaining were fully discussed. Respondent's contract negotiators had full and unlimited authority to bargain on all matters. (RA 22)

Second, Petitioner has incorrectly stated that Respondent did not furnish classifications, wage rates and dates of employment of its employees. While the information might not have been as complete, or in the form the union wanted it, Respondent did furnish to the union such information as it had in this regard. (BA 10, 141-142) Respondent, in its proposal, presented to the union in April 1954 listed job classifications and wage rates of plant employees. (RA 53-55; BA 100-102)

Third, Petitioner has incorrectly stated that in April 1953 this Respondent unilaterally put certain wage adjustments into effect for some of its employees. The record clearly shows that a wage adjustment was made in the course of negotiations during April 1954 at the insistence of the union, with the union's full permission and knowledge. (BA 61-62; 207; BB 29-30)

Fourth, while, as Petitioner states, at the October 15, 1954 negotiation conference, the wage increase Respondent had announced on October 6, 1954, effective October 4, 1954, was discussed, such wage increase was not unilateral. The union negotiator, Wellborn, testified that he was told of the increase on October 4 or 5, 1954. (RA 3-5) No objection was made by him to the proposed increase. (RA 21) The wage increase was but an adjustment by the company in keeping with its established policy of paying its employees wages comparable with those in the area, which policy was well known to the union. (BA 282)

The remaining portions of Petitioner's statement are substantially accurate, though incomplete and not germane to the questions before the court.

ARGUMENT

A. The Decision Below Is Correct.

It is clear and plain that the real question decided by the Board and the Court below, and the only question that is properly here before the court is whether or not the Board has authority to issue an order based on alleged

transactions occurring more than four months subsequent to the filing of a charge and ten months prior to the issuance of a complaint where such transactions are not embraced in or contemplated by the charge, and regardless of whether or not the complaint was properly issued.

The Petitioner now, as in the Court below, seeks to divert the Court's attention from the real question in issue and argues that Respondent refused to bargain in good faith up to and prior to the filing of the charge. The Board, in its decision, stated in effect that the decision was based upon a finding that Respondent had unilaterally granted a wage increase in October 1954 and had unlawfully withdrawn recognition of the union in November 1954. (R 118, 126, 130) In fact, the Regional Director, as late as July 13, 1954, advised the parties that there was insufficient evidence of violations to warrant further proceedings. (R 251, 129) It was not until January 24, 1955, while the refusal of the Regional Director to issue a complaint was on appeal to General Counsel, that the Regional Director, upon his own volition, advised the parties that he was withdrawing his refusal to issue the complaint and would as to the allegations of violation of Section 8(a)5 of the Act proceed with investigation under the charge that had been filed on May 20, 1954. This came about subsequent to the October 1954 wage increase and November 1954 withdrawal of recognition which Petitioner in its decision and before the Court below conceded to be the basis of its decision.

Respondent urged in the Court below that, in any event, the order of the Board was not supported by substantial evidence. The Court of Appeals did not disagree with this contention and denied enforcement for other reasons, saying, however, "there is not in the record more than a hint of anything improper until after October 1". (BB 20) Further, Chief Judge Hutcheson in his concurring opinion held that the record as a whole did not support the Board's finding that Respondent had refused to bargain in good faith. (BB 31)

The Court's decision denying enforcement is well supported by a long line of authority. The National Labor Relations Act does not require the signing of a contract upon any specific terms, it requires bargaining not capitulation. *NLRB v. American National Insurance Company, Sup. Ct. 1952, 343 U. S. 395, 72 Sup. Ct. 824.* The Board concedes in its order and in its brief before the Court below that without injecting into this case entirely new matter, i.e., the October 1954 wage increase and November 1954 withdrawal of union recognition, completely unrelated to the charge, the substantial evidence rule is not met. (BB 32-33; R 119, 130-131) There is much authority to support the holding of the court below that these new matters can not be used to form the basis of an order against Respondent. *N. L. R. B. v. I. B. S. Manufacturing Company, et al. (C. A. 5, 1954), 210 F. 2d 634, 637; Indiana Metal Products Corporation v. N. L. R. B. (C. A. 7, 1953), 202 F. 2d 613, 619; N. L. R. B. v. Newton (C. A. 5, 1954), 214 F. 2d 472, 474;* and *Section 10(b) of the National Labor Relations*

Act. On the other hand, there is no authority to support the position of Petitioner.

B. There is No Conflict of Decisions.

The decision of the court below is correct. It is not in conflict with any decision known to Respondent. Petitioner states there is a conflict of decisions and uses such as the basis for requesting this court to grant a writ of certiorari. This statement of Petitioner is incorrect. Petitioner states the decision of the court below conflicts with the holding of the Third Circuit in *National Labor Relations Board v. Epstein, 203 F. 2d 482, 485, certiorari denied 347 U. S. 912*, and with the holding of this court in *National Licorice Company v. National Labor Relations Board, 309 U. S. 350, 367-369.* This statement is also incorrect. There is no conflict with these decisions.

In the *National Licorice* case (supra), decided by this court, the employer was charged with attempting to coerce its employees into signing individual contracts and attempting to compel employees to form committees not of their own choosing for bargaining purposes. An amended charge was filed therein on August 2, 1937, alleging the same matters. On October 2, 1937, the Board issued a complaint alleging that the employer had engaged in such practice down to the date of the filing of the complaint. The employer objected to including in the complaint these same violations down to the time of filing the complaint. This court held that the Act did not preclude the Board from dealing with unfair labor practices which are related to

those alleged in the charge and which grow out of them while the proceeding is pending before the Board. In this connection this Court said:

> "the violations alleged in the complaint and found by the Board were but a prolongation of the attempt to form the company union and to secure the contracts alleged in the charge. All are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken."

As this court can readily see, the *National Licorice* case is not analogous to the fact situation here before the court for two reasons. The first of these reasons is that the November 1954 refusal by Respondent to recognize the union as the bargaining agent for its employees and the October 6, 1954 wage increase are not continuations of any unfair labor practice alleged in any charge filed against Respondent. The only charge filed against Respondent alleged that Respondent, on or about November 20, 1953, refused to bargain in violation of the Act. There was no allegation in the charge that Respondent refused to bargain at any other time or continued its action beyond that date. In fact, the date of November 20, 1953, is more than six months prior to the filing of the charge and does not and did not invoke the jurisdiction of the National Labor Relations Board. In any event, the November 1954 and October 1954 events, upon which Petitioner relies, are not a part of a continuing allegation contained in the charge,

such as was involved in the *National Licorice* case. A charge of a refusal to bargain is not of itself a continuing offense. *American Federation of Grain Millers v. N. L. R. B. (C. A. 5, 1952), 197 F. 2d 451, 454.* In those cases with which Respondent is familiar, that have permitted unfair labor practices occurring subsequent to the filing of the charge to stand as a basis for entering an order against an employer, the charge alleged a refusal to bargain on a certain date together with all times after such date and the subsequent events considered were closely related in point of time and substance. *N. L. R. B. v. Harris, 200 F. 2d 656, 658; N. L. R. B. v. Anchor Rome Mills, Inc., 228 F. 2d 775,* both decided by the Fifth Circuit Court of Appeals and both relied upon by Petitioner in the court below and *N. L. R. B. v. Epstein, 203 F. 2d 482,* relied upon by Petitioner in this Court. The November 1954 and October 1954 incidents, while not constituting a violation of the Act were never within the jurisdiction of the Board. The jurisdiction of the Board was not invoked with regard thereto and the Board could not look to such incidents as forming a basis for an order against Respondent.

Secondly, the *National Licorice* case is not authority for the position of Petitioner because the same was decided in the year 1940, long prior to the 1947 amendment to the National Labor Relations Act whereby Section 10(b) was added to the Act precluding the issuance of complaint based upon any charge alleging that an unfair labor practice had occurred more than six months prior to the filing of the charge. The only alleged unfair labor practice set out in

the charge as occurring within the six-month limitation period as provided by this Section of the Act, had to do with alleged violations of Section 8(a)3 of the Act. All of these portions of the charge were dismissed and no complaint issued thereon. The portion of the charge, upon which the complaint issued, charged Respondent with violation of Section 8(a)5 of the Act by having refused to bargain on a date more than six months prior to the filing of the charge. Thus, the complaint was issued in violation of Section 10(b) of the Act from its outset. Nevertheless, the complaint was not filed until August 17, 1955. This is ten months subsequent to the October and November 1954 incidents. To now hold that the complaint relates back to the time of the filing of the charge and that all matters occurring between the filing of the charge and issuance of the complaint were in issue before the Board, notwithstanding that such incidents occurred subsequent to the filing of the charge and more than six months prior to the issuance of the complaint, renders Section 10(b) of the National Labor Relations Act a complete nullity. To so hold, would but lead to the inescapable conclusion of unions keeping on file continuously a charge of a general nature so as to forever preclude the use of Section 10(b) of the Act. Such a decision is contrary to the Act and constitutes legislative rather than judicial action. The statement of Petitioner to the effect that the language of Section 10(b) of the Act and its legislative history show that it was designed to govern violations prior to the filing of a charge and not subsequent violations, irrespective of time and subject matter, is without support and is not sound.

Respondent does not have available the Senate Report referred to by Petitioner but the House Report does not support such statement. Congress made it clear in its report and in the language of the statute that no complaint shall issue on any matter occurring more than six months prior to the filing of the charge. *U. S. Code Congressional Service 80th Congress, Page 1159.* To hold otherwise, as Petitioner seeks, evades the plain dictates of Congress. As the court below stated, if the union had wanted Respondent's withdrawal of its recognition of the union in November, 1954, and the wage increase of October 6, 1954, in issue, it could have put them in issue by filing an amended charge. This it chose not to do. The Court's attention is also called to the fact that the complaint with which we are here concerned issued more than six months subsequent to the alleged actions of Respondent upon which Petitioner relies.

It is clear that the 1940 decision of this Court in the case of *National Licorice Company v. National Labor Relations Board* (supra) is not authority for the position of Petitioner.

It is equally clear that the decision of the court below is not in conflict with the case of *N. L. R. B. v. Epstein, 203 F. 2d 482.* In the *Epstein* case a charge of a refusal to bargain was filed on September 28, 1949. On April 2, 1950, the union filed an amended charge. There was no amended charge filed in the instant case. In the *Epstein* case, the Court held that the amended charge related back to the date of the original charge. The question was raised in the

Epstein case of the amended charge being filed more than six months subsequent to some of the incidents there involved. The court held in the *Epstein* case that the subsequent events were but continuations of a continuing violation that was alleged in the original charge. While it does not constitute a holding of the Court, inasmuch as the question was not involved, the Third Circuit did state in the *Epstein* case by way of dictum, "* * * even without the amended charge we think the complaint in this case could have properly included the matters occurring subsequent to the filing of the charge, for the original charge was of a continuing violation and the subsequent acts were of the same class and were continuations of and in pursuance of the same objects. *National Labor Relations Board v. Harris, C. A. Fifth Circuit, 1953, 200 F. 2d 656.*"

This dictum does not support the position of Petitioner herein inasmuch as no continuing violation was alleged against this Respondent in the charge upon which Petitioner relies.

Thus, for two reasons, the decision of the court below is not in conflict with the *Epstein* case. The first of these reasons is that in the *Epstein* case an amended charge was filed. This was not done in the instant case. The second reason is that the original charge in the *Epstein* case alleged a continuing violation. This was not done in the instant case.

There is no conflict of decisions and no reason exists for this court to grant the writ requested. To the contrary, the decision of the court below is in conformity with other

decisions previously rendered. *N. L. R. B. v. Newton (C. A. 5), 214 F. 2d 472; Indiana Metal Products Corporation v. N. L. R. B. (C, A. 7), 202 F. 2d 613.* Both arrive at the same holding as did the court below. In both of those cases it was held by the Circuit Court of Appeals that in matters where an amended charge was filed, the Board was precluded from entering a finding of a violation of the Act as to all matters occurring subsequent to the filing of the original and more than six months prior to the filing of an amended charge, wherein the original charge was not one of a continuing violation. The court below has not gone this far in the instant decision. The court below has but held, where no amended charge was filed, the Board could not look to events occurring subsequent to the filing of the original charge and more than six months prior to the issuance of the complaint as forming a basis for a finding that the employer had violated the Act, wherein no continuing violation was alleged and the acts complained of were not contemplated by or encompassed in the charge. Such is the plain intent of Section 10(b) of the Act. To hold otherwise is to circumvent and render a nullity, this action of Congress and puts the Court in the field of the Legislative rather than the Judiciary.

Each of the other cases referred to by Petitioner are not in point. The cases of *N. L. R. B. v. Kobritz, et al., 193 F. 2d 8; N. L. R. B. v. Kingston Cake Company, 191 F. 2d 563; Kansas Milling Company v. N. L. R. B., 185 F. 2d 413; N. L. R. B. v. Gaynor News Co., 197 F. 2d 719* and *N. L. R. B. v. Kohler Company, 220 F. 2d 3*, relied on by Peti-

tioner, each involve question of amended charges relating back to original charges and the authority of the Board to enlarge upon the contents of a charge so long as the enlargement has to do with the same matters set out in the charge. These are not questions here before the Court. The decision of the court below is not in conflict with these holdings.

Further, the opinion of the Court below would not hamper the Board in its enforcement of the National Labor Relations Act as argued by Petitioner. It properly restricts the Board and requires it to enforce the Act as written rather than permitting the Board to initiate action. As observed by the Seventh Circuit Court of Appeals in the *Kohler* case (supra), if the Board gets outside of the situation which gives rise to the charge it is in effect initiating the proceeding, and the complaint must fall. This is what the Board has done in the instant case and the court below properly denied enforcement.

C. Unauthorized Issuance of the Complaint.

As heretofore pointed out, the complaint herein was improperly issued because:

1. All matters in the charge within the six-month period of limitation were dismissed and the complaint was issued upon an allegation in the charge allegedly occurring more than six months before the filing of the charge in violation of Section 10(b) of the Act.

2. The Regional Director circumvented and violated the published *Rules and Regulations* and *Statement of Procedure* of the Board in the issuance of the complaint.

The first reason has previously been discussed. The complaint is clearly unauthorized because of the second reason as well. Section 102.19 of the Board's *Rules and Regulations* provides as follows:

> "If, after the charge has been filed, the Regional Director declines to issue a complaint, he shall so advise the parties in writing, accompanied by simple statements of the procedural or other grounds. The person making the charge may obtain a review of such action by filing a request therefor with General Counsel in Washington, D. C., and filing a copy of the request with the Regional Director, within ten days from the service of notice of such refusal by the Regional Director."

Section 101.6 of the Board's *Statements of Procedure* provides:

> "If complainant appeals to the General Counsel, the entire file in the case is sent to Washington, D. C., where the case is fully reviewed by the General Counsel with the assistance of his staff. Following such review, the General Counsel may sustain the Regional Director's dismissal, stating the grounds of his affirmance, or may direct the Regional Director to take further action."

As heretofore pointed out, the Regional Director refused to issue a complaint upon the charge filed and appeal was taken by the union to General Counsel. While this request for review was pending before General Counsel, without General Counsel having acted thereon, the Regional Director withdrew his refusal to issue a complaint in violation of the expressed provisions of the Board's *Rules and Regulations*, its *Statements of Procedure*, and Section 3(a) of *The Administrative Procedure Act, 5 U. S. C. A. 1001 Et Seq.*

Upon the appeal being taken, the Regional Director lost all jurisdiction of the charge and could act no further until General Counsel acted thereon.

The dissenting member of the Board concurs that the Regional Director's action was clearly contrary to the Board's established procedure and that such irregular action taken by the Regional Director before the filing of the complaint was prejudicial to Respondent. (R 131-133)

CONCLUSION

By virtue of the premises, Respondent respectfully submits that the Honorable United States Court of Appeals, Fifth Circuit, properly denied enforcement of the Board Order and the Petition for Writ of Certiorari should in all things be denied.

Respectfully submitted,

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O. B. FISHER
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November 28, 1958.

CERTIFICATE

The undersigned Counsel for Respondent certifies that five copies of the foregoing brief were deposited in the United States Postoffice, air mail postage prepaid, to each J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C. and Jerome D. Fenton, General Counsel of National Labor Relations Board, Washington 25, D. C. this November 28th, 1958.

O. B. Fisher

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